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The Constitutionality of School Corporal Punishment of Children as a Betrayal of Brown v. Board of Education

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I. INTRODUCTION

American judicial history, like any institutional history, has had its shameful moments and its glorious ones, with plenty in-between. Some of the worst and best of these decisions have concerned race relations. Consider such low points for the United States Supreme Court as *Dred Scott v. Sandford*[1] and the Japanese-American restriction cases.[2] The former, among other things, essentially upheld slavery as constitutional[3] while the latter upheld the constitutionality of the mass internment of and curfew imposed upon persons of Japanese ancestry who lived on the West Coast during World War II.[4] Even taking into account that these decisions were creatures of other, more backward eras, their

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1. Dred Scott v. Sandford, 60 U.S. 393 (1856).

2. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (affirming the United States war power right to exclude persons of Japanese ancestry from military areas); Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding curfew restrictions against persons of Japanese ancestry in military areas).

3. *Dred Scott*, 60 U.S. at 404-05, 411, 425–27, 450–51 (ruling that descendants of American slaves were neither "citizens" nor "persons" within the meaning of the Constitution and that when Congress outlawed slavery in federal territory, the result was a deprivation of slaveholders' "property" under the Due Process Clause of the Fifth Amendment). The Thirteenth and Fourteenth Amendments to the Constitution subsequently nullified *Dred Scott's* rulings with respect to slavery. The Thirteenth Amendment prohibits slavery in the United States. U.S. CONST. amend. XIII, § 1. The Fourteenth Amendment states that any person born or naturalized in the United States is a citizen of the United States. U.S. CONST. amend. XIV, § 1.

4. *See Korematsu*, 323 U.S. at 217–19 (upholding the constitutionality of exclusion of persons of Japanese ancestry from the West Coast regardless of their individual loyalty to the United States during World War II); *Hirabayashi*, 320 U.S. at 93–102 (upholding the constitutionality of curfews imposed upon persons of Japanese ancestry residing on the West Coast regardless of individual loyalty to the United States during World War II). *But see Ex parte* Endo, 323 U.S. 283, 297, 300–04 (1944) (holding that the War Relocation Authority had no authority to subject a person of Japanese ancestry, who was undisputedly loyal to the United States during World War II, to its procedure for obtaining leave from internment).

remembrance is still enough to make one wince.[5]

Brown v. Board of Education[6] ("*Brown I*") is, in my opinion, one of the United States Supreme Court's redeeming glorious moments. The holding, stripped to its barest essentials, is that *de jure* racial segregation of students in public elementary and secondary schools inherently violates the Equal Protection Clause of the Fourteenth Amendment.[7] In so ruling, the Court effectively repudiated its own long-held doctrine, previously articulated in *Plessy v. Ferguson*,[8] that so-called separate but equal facilities for whites and blacks are constitutional.[9] The Court not only halted its own retrogressive momentum, but it also put itself in the vanguard of the nascent struggle for civil rights in a nation that was badly divided on the issue.[10] For among whites at that time, the dominant sentiments toward racial segregation were represented by apathy in the North and sympathy in the South.[11]

The story surrounding how *Brown I* came to be and how it has been implemented is, however, somewhat less glorious than the landmark

5. *See* Christopher L. Eisgruber, *The Story of* Dred Scott: *Originalism's Forgotten Past, in* CONSTITUTIONAL LAW STORIES 151, 151 (Michael C. Dorf ed., 2004) [hereinafter CONSTITUTIONAL LAW STORIES] (describing the *Dred Scott* Court's conclusions as sullying "the Court's reputation" and labeling them "a disaster"); Neil Gotanda, *The Story of* Korematsu: *The Japanese-American Cases, in* CONSTITUTIONAL LAW STORIES 249, 257 (Michael C. Dorf ed., 2004) (observing that the military's internment of persons of Japanese ancestry, upheld by the United States Supreme Court in *Korematsu*, was "racist").

6. Brown v. Board of Education, 347 U.S. 483 (1954) [hereinafter *Brown I*].

7. *Id.* at 495. The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

8. Plessy v. Ferguson, 163 U.S. 537, 548–49, 552 (1896) (upholding under the Equal Protection Clause of the Fourteenth Amendment Louisiana's racial segregation of railroad passengers on the theory that the facilities could be separate for the races and, at the same time, equal).

9. *Brown I* did not expressly overrule *Plessy*, but its effect in the educational context was much the same as if it had done so. *See* 3 RONALD ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.8, at 331 (3d ed. 1999).

10. *See* JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 6–7 (2001) (describing the late 1940s and early 1950s as the beginnings of the full-fledged civil rights movement of later years); *see also* Nathaniel R. Jones, *The Harlan Dissent: The Road Not Taken—An American Tragedy*, 12 GA. ST. U. L. REV. 951, 959 (1996) (remarking that in the 1930s and 1940s the civil rights movement mostly took the form of litigation undermining *Plessy*, thus reflecting discontent among blacks well before the 1950s when the civil rights movement began to burgeon).

11. *See* PATTERSON, *supra* note 10, at 7–8 (describing how public opinion polls from the 1950s revealed increasing support from northern whites for liberal policies concerning race, but that advocates had trouble "arousing active backing from white Northerners"); *see also* Robert A. Leflar & Wylie H. Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377, 421 (1954) (describing the majority of the residents of southern states as favoring racial segregation of the schools in the early 1950s).

decision itself. In 1952, the Supreme Court was first presented with the prospect of ruling on the constitutionality of cases that came to comprise *Brown I*.[12] Evidence suggests that the Vinson Court, so divided on so many issues in 1952, was likely to bring further divisiveness to deciding the constitutionality of public school racial segregation.[13] The Court delayed before ordering rehearings of the cases in 1953.[14] Nevertheless, political events were weighing on the Court to get the cases decided and decided the right way. On the domestic front, the Court faced the beginnings of a more vocal and restive civil rights movement in the black community.[15] Additionally, considerable international embarrassment arose from tolerating legalized racial segregation on American soil after fighting racially supremacist, anti-semitic Nazis and prosecuting them at Nuremberg.[16] In other words, the Court, rather than leaping at the chance to lead, rather gingerly found its way into forging a more enlightened chapter of race relations in the education context.

The saga of *Brown I's* implementation has been, in my opinion, even more disappointing than the story of its genesis. Although in the remedial phase of the litigation, *Brown v. Board of Education*[17] (*"Brown II"*), the Court remanded to the district courts and directed

12. PATTERSON, *supra* note 10, at 45–46, 52.

13. *See id.* at 54-56 (discussing individual justices and their divergent views in the 1950s); *See also* Daniel Gyebi, *A Tribute to Courage on the Fortieth Anniversary of* Brown v. Board of Education, 38 HOW. L.J. 23, 37 n.83 (1994) (noting the 5–4 Supreme Court split led by Chief Justice Vinson in favor of upholding segregation); Mark Tushnet & Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867, 1870–72 (1991) (discussing Chief Justice Vinson's inability to lead or unify the Supreme Court).

14. PATTERSON, *supra* note 10, at 57 (discussing that the reason for a scheduled re-hearing in June 1953 was so that Supreme Court Justices, notably Justice Frankfurter, could reflect on the intent of the Framers of the Fourteenth Amendment concerning schools); Tushnet & Lezin, *supra* note 13, at 1872, 1908–09.

15. PATTERSON, *supra* note 10, at 56; *See also* Michael J. Klarman, *Twentieth-Century Constitutional History:* Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 14, 16–21 (1994); Derrick A. Bell, Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524–25 (1980).

16. *See* PATTERSON, *supra* note 10, at 56 (discussing that racial segregation in the United States made the "Jim Crow America vulnerable to the charge of hypocrisy when it claimed to lead the Free World"); Steve Bachmann, *Rights on Trial*, 62 TEX. L. REV. 1601, 1608 (1984) (book review) (discussing the conflict in the mid-1950s between the United States's role as "leader of the free world" and the apparent lack of freedom for segregated black people in the South); Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation*, 69 IOWA L. REV. 901, 941 (1984) (quoting from the government's brief in Henderson v. United States, 339 U.S. 816 (1950), "[o]ur position and standing before the critical bar of world opinion are weakened if segregation not only is practiced in this country but also is condoned by federal law").

17. Brown v. Board of Education, 349 U.S. 294 (1955).

them to take measures so that petitioners could, with "all deliberate speed,"[18] be admitted on a racially non-discriminatory basis to the schools involved, the parties to many subsequent school desegregation cases hardly took this standard to heart. The law books are littered with court decisions mandating grossly recalcitrant school boards to implement *Brown I.*[19] Some of the court decisions themselves arguably impeded progress by declining to order more thorough-going remedial measures.[20] But that is another topic for another scholar on another day.

I merely raise this context to show that there has been no shortage of obstacles to *Brown I's* development, even when it was only a gleam in Thurgood Marshall's eye. Now, some obstacles are intentionally created and some are unwittingly created. Many of the obstacles referenced above seem to belong in the intentional category. This article will focus from here, however, on a roadblock of the unwitting variety.

II. *INGRAHAM V. WRIGHT*

The particular impediment to *Brown I's* effectuation that I wish to address is *Ingraham v. Wright*,[21] a 1977 Supreme Court decision that, on its face, has absolutely nothing to do with racial integration or harmony. In this case, petitioners James Ingraham and Roosevelt

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18. *Id.* at 301.

19. *See, e.g.*, Alexander v. Holmes Co. Bd. of Educ., 396 U.S. 19, 20–21 (1969) (per curiam), *reh'g denied*, 396 U.S. 976 (1969); Green v. County Sch. Bd., 391 U.S. 430, 431–35, 437–42 (1968); Griffin v. Sch. Bd. of Prince Edward County, 377 U.S. 218, 220–225, 231–33 (1964), *mot'n granted*, 377 U.S. 950 (1964); Cooper v. Aaron, 358 U.S. 1, 4, 7–16 (1958). For a listing and summary of such cases, see 3 ROTUNDA & NOWAK, *supra* note 9, § 18.9, at 343, 344 & nn.14-15.

20. *See* Susan H. Bitensky, *We "Had a Dream" in* Brown v. Board of Education. . ., 1996 DETROIT C.L. MICH. ST. U. L. REV. 1, 3–4, 13 [hereinafter Bitensky, *Dream*] (explaining that the expectations and aspirations naturally inspired by *Brown* have, after forty-two years, remained substantially unfulfilled); Kevin Brown, *Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education*, 78 IOWA L. REV. 813, 817–18 (1993) (describing that new reports indicate that schools were just as segregated in 1990 as they were in the 1970s); Chris Hansen, *Are the Courts Giving Up? Current Issues in School Desegregation*, 42 EMORY L.J. 863, 867–69 (1993) (discussing the pre-existing views of judges when making decisions); Robert L. Hayman, Jr. & Nancy Levit, *The Constitutional Ghetto*, 1993 WIS. L. REV. 627, 638–56 (1993) (discussing courts' different doctrinal components in assessing school segregation); Sonia R. Jarvis, Brown *and the Afrocentric Curriculum*, 101 YALE L.J. 1285, 1285–86, 1289–91 (1992) (stating that "the Supreme Court has demonstrated increasing antipathy toward race-conscious remedies designed to overcome discrimination in education, employment, and housing"); Donald E. Lively, *The Effectuation and Maintenance of Integrated Schools: Modern Problems in a Post-Desegregation Society*, 48 OHIO ST. L.J. 117, 125–27 (1987) (discussing the consciousness of race while making judicial decisions concerning variants of segregation in schools).

21. Ingraham v. Wright, 430 U.S. 651 (1977).

Andrews were students at a public junior high school in Florida.[22] The state of Florida at that time had a statute permitting corporal punishment in schools as long as it was not "degrading or unduly severe" or was not administered without consulting the principal.[23] Because he did not follow his teacher's directions with the desired alacrity, Ingraham received more than twenty licks with a paddle on his clothed buttocks while being pinned to a table in the principal's office.[24] As a result, he developed a hematoma requiring medical intervention and necessitating his absence from school for several days.[25] Andrews was also paddled several times, sometimes on his arms, for minor violations of school rules.[26] In one of these disciplinary sessions, he was hit so hard that he lost the full use of his arm for a week.[27] The paddle, by the way, was a flat, wooden affair approximately two feet long, three to four inches wide, and one-half inch thick.[28]

The Supreme Court agreed to hear two of petitioners' claims in the ensuing suit.[29] The first claim was that corporal punishment of public school students as a disciplinary technique constitutes cruel and unusual punishment in violation of the Eighth Amendment to the Constitution.[30] The second claim was that administering such punishment without first giving students notice and an opportunity to be heard violates the Due Process Clause of the Fourteenth Amendment.[31] The Supreme Court rejected both claims.[32]

For purposes of making the argument that the *Ingraham* ruling betrayed the promise of *Brown I*, it is necessary only to focus on the *Ingraham* Court's treatment of the Eighth Amendment issue. That

22. *Id.* at 653.

23. *Id.* at 657 n.6 (quoting Florida's statute, FLA. STAT. ANN. § 232.27 (1961), as of the 1970–71 academic year, governing corporal punishment in the schools).

24. *See id.* at 657 (holding that "school authorities viewed corporal punishment as a less drastic means of discipline than suspension or explusion").

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 656.

29. *See id.* at 658–59 (discussing that one count was a class action, while the other counts were individual damages actions concerning the Eighth Amendment). Petitioners' other claim was that public school corporal punishment is a substantive due process violation. *See id.* at 659 n.12 (denying the review of the third question presented in the petition for certiorari: "Is the infliction of severe corporal punishment upon public students arbitrary, capricious and unrelated to achieving any legitimate educational purpose and therefore violative of the Due Process Clause of the Fourteenth Amendment?").

30. *Id.* at 659–60.

31. *Id.*

32. *Id.* at 671, 682.

Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[33] The Court essentially had one rationale for its disposition of the Eighth Amendment issue. However, before explaining that rationale, the Court seemingly strayed into a survey of "traditional common-law concepts" and "the 'attitude(s) which our society has traditionally taken'" towards corporal punishment of children in school.[34] The Court found the practice to be deeply entrenched in our history, dating back to the colonial period and continuing in most parts of the United States right up until the *Ingraham* opinion.[35] Acknowledging that professional as well as popular opinion had been at odds for over a century on the advisability of such punishment,[36] the Court concluded that "we can discern no trend toward its elimination."[37] The Court likewise found the prevailing common law principle governing the use of this punishment in 1977 to hail as far back as the American Revolution or earlier,[38] i.e., the principle being that school personnel may inflict reasonable, although not excessive force, to discipline children; excessive force, however, subjects the punishers to potential civil and criminal liability.[39]

Why the Court went into this historical exegesis on the status of corporal punishment of schoolchildren in the United States is not entirely clear. The Court purportedly did not consider this description as part of its constitutional analysis under the Eighth Amendment, characterizing the whole exercise as "this background of historical and contemporary approval of reasonable corporal punishment."[40] It is intriguing why the Court felt compelled to set the stage so elaborately. One is left with the impression that this was not merely a stage set, but rather was tacitly integral to the Eighth Amendment analysis. That is, because the Court viewed school corporal punishment as a long-standing feature of the American experience, it became legally and politically more comfortable for the Justices to deny children the Eighth Amendment's protection against the practice. Such a ruling consonant

33. U.S. CONST. amend. VIII.

34. *Ingraham*, 430 U.S. at 659 (quoting Powell v. Texas, 392 U.S. 514 (1968)).

35. *Id.* at 660.

36. *Id.* at 660–61.

37. *Id.* at 661.

38. *Id.*

39. *See id.* (discussing that "[a]t common law, a single principle has governed the use of corporal punishment since before the American Revolution: teachers may impose reasonable but not excessive force to discipline a child").

40. *Id.* at 663.

with United States history could not, after all, open the Court to charges of social engineering that were alien to the nation's traditional normative prejudices on the subject.

In any event, the Supreme Court's acknowledged rationale for rejecting petitioners' Eighth Amendment claim was that the Amendment's guarantee against cruel and unusual punishments is a constraint exclusively on criminal punishments and therefore cannot be extended to protect children from public school disciplinary punishments.[41] According to the majority opinion, the stinginess of the Eighth Amendment's reach is supported by original intent[42] and *stare decisis*.[43] As to the latter, the *Ingraham* Court specified that its previous Eighth Amendment decisions had limited the criminal process in three ways.[44] First, the decisions limit the type of punishment that can be imposed on convicts.[45] Second, they bar penalties grossly disproportionate to the seriousness of the crime.[46] Finally, they place substantive limits on what activities can be classified as criminal and punished by the criminal justice system.[47]

Petitioners argued that the Framers of the Eighth Amendment could not have imagined the modern American compulsory public school system and its power to mete out non-criminal punishments.[48] The inference, of course, is that had the Framers known, surely they would have desired to protect schoolchildren at least as much as they did prisoners. The Court attempted to counter this argument by distinguishing prisoners' life situations from those of schoolchildren:

> The schoolchild has little need for the protection of the Eighth Amendment. Though attendance may not always be voluntary, the public school remains an open institution. Except perhaps when very young, the child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.[49]

41. *Id.* at 664–71.
42. *Id.* at 664–66.
43. *Id.* at 666–68.
44. *Id.* at 667.
45. *Id.*
46. *Id.*
47. *Id.* at 667.
48. *Id.* at 668–69.
49. *Id.* at 670.

I will put to one side, for the moment, the various weaknesses in the *Ingraham* majority's reasoning outlined above. There are urgent reasons for exposing *Ingraham's* problematic nature and a full exposé of those problems will follow an explanation of the connection between *Brown I* and *Ingraham.*

III. THE CONNECTION: *BROWN I* AND *INGRAHAM*

So, what is the relationship between *Brown I* and *Ingraham*? *Brown I's* barebones holding is that *de jure* racial segregation of children in public elementary and secondary schools violates the Equal Protection Clause of the Fourteenth Amendment.[50] The factual linchpin of the Court's holding is the unanimous opinion's famous footnote eleven which references various social science publications supporting the proposition that racial segregation of children at these levels of schooling causes African-American children to feel inferior; these inferiority feelings, in turn, undermine the motivation of black children to learn and impedes their "educational and mental development" in a way "unlikely ever to be undone."[51]

Thus, the whole foundation for *Brown I's* holding on segregated schools is a fervent concern that the schools should imbue children, especially black children, with a positive sense of their intellectual worth and should provide them with a commensurate quality of educational experience. Specifically, the Court described the sort of education that children should be positioned to take advantage of: an education that prepares them for "good citizenship," that initiates them into the ranks of the culturally literate, and that gives them the grounding for "later professional training."[52] Note that an education of this ilk is not limited to the basics, but rather entails a well-rounded and sophisticated curriculum designed to help all children mature into personally fulfilled adults who will be able to make meaningful contributions to society.[53] The *Brown I* decision was contextual, and

50. *See supra* notes 6–7 and accompanying text (remarking that segregation in public education violates the Equal Protection Clause of the Fourteenth Amendment).

51. Brown v. Board of Education, 347 U.S. 483, 494 & n.11 (1954) (quoting from a Kansas lower court in the *Brown I* litigation).

52. *Id.* at 493.

53. *See* Bitensky, *Dream, supra* note 20, at 6, nn.25–26 (stating how quality education prepares students for life and active community participation); David Chang, *The Bus Stops Here: Defining the Constitutional Right of Equal Educational Opportunity and an Appropriate Remedial Process*, 63 B.U. L. REV. 1, 33–34 (1983) (discussing how education aids people in acquiring skills that are rewarded in society and equips blacks to compete in society); Marvin P. Dawkins & Jomills H. Braddock II, *The Continuing Significance of Desegregation: School Racial Composition and Arican-American Inclusion in American Society*, 63 J. NEGRO EDUC. 394, 394,

that context was a concern for a high standard of education in the public schools and for black children's receptive psychological condition as a predicate to benefiting from such an education. Desegregation that would result in racially-integrated schoolhouses offering substandard education or even offering excellent education to children psychologically unable to profit from it would be an incomplete, if not perverse, realization of *Brown I's* import. This concern is the more subtle part of *Brown I's* holding, what Professor Robert Sedler has dubbed *Brown I's* "educational rationale,"[54] and what I would also call its "psychological enabling component."

The constitutional standard which apparently should follow from this aspect of *Brown I* is that meaningful equal protection must involve public elementary and secondary schools in a process of psychological enabling: that is, psychologically enabling African-American children to have the confidence to succeed in a superior educational milieu. At the very least, the post-*Brown I* Equal Protection Clause should be understood to prohibit public schools from doing anything to deride or undercut that confidence.

Ingraham significantly hinders the fruition of *Brown I's* commitment to educational excellence and psychological enabling. Recall the *Ingraham* Court's holding that the Eighth Amendment does not protect children in any way from corporal punishment in the nation's public elementary and secondary schools.[55] As of this writing, slightly under one-half of the states have availed themselves of *Ingraham's* latitude by

403 (1994) (remarking how desegregation has a positive effect on career goals and social assimilation); Peter M. Shane, *School Desegregation Remedies and the Fair Governance of Schools*, 132 U. PA. L. REV. 1041, 1050, 1053 (1984) (discussing the psychological and academic harm that results from segregated schools). *But see* Brown, *supra* note 20, at 837–38 (contending that *Brown I* may actually have impeded African-American empowerment because the Court focused on the notion that racial segregation retards the intellectual development only of minority children).

54. Robert A. Sedler, *Metropolitan Desegregation in the Wake of* Milliken*—On Losing Big Battles and Winning Small Wars: The View Largely From Within*, 1975 WASH. U. L.Q. 535, 543 (1975). Professor Sedler wrote: "The Supreme Court in *Brown* had proceeded upon the educational rationale that racial segregation was harmful to black children because it deprived them 'of some of the benefits they would receive in a racially integrated school system.'" *Id.* at 548 (quoting *Brown I*, 347 U.S. at 494). *See also* Robert William Gall, *The Past Should Not Shackle the Present: The Revival of a Legacy of Religious Bigotry by Opponents of School Choice*, 59 N.Y.U. ANN. SURV. AM. L. 413, 437 (2003) (referring to *Brown I's* commitment to providing all children with "a quality education"); Sharon Elizabeth Rush, *The Heart of Equal Protection: Education and Race*, 23 N.Y.U. REV. L. & SOC. CHANGE 1, 4–5 (1997) (describing *Brown I* as a "profound statement about the importance of a quality education to a child's welfare," a principle "essential to the case").

55. *See supra* notes 30, 32 and accompanying text (explaining that the *Ingraham* court rejected the claim that corporal punishment of public school children as a disciplinary technique constitutes cruel and unusual punishment in violation of the Eighth Amendment).

enacting legislation permitting corporal punishment of children in the schools.[56] This situation, I submit, is a conducive strategy—equally as conducive as segregation—for making African-American children feel inferior and thereby stifling their intellectual growth.

How can that be? What is the basis for making such an assertion? The first thing to remark by way of explanation is that the most recent scientific evidence has dispositively established that corporal punishment of children, regardless of its venue or the racial identity of the children, is correlated with ten seriously adverse psychological outcomes for the child-victims. In 2002, psychologist Dr. Elizabeth Gershoff published meta-analyses that established an association between parental corporal punishment of children and (1) decreased moral internalization, (2) increased child aggression, (3) increased child delinquent and antisocial conduct, (4) decreased quality of the parent-child relationship, (5) decreased child mental health, (6) increased risk of undergoing conventional physical child abuse; and, upon reaching maturity, (7) increased adult aggression, (8) increased adult criminal and antisocial behavior, (9) decreased adult mental health, and (10) increased risk of abusing one's own child or spouse.[57] She has since theorized that, in light of some of the parallels between the parent-child and teacher-student relationship, these negative impacts may result from

56. *See* Center for Effective Discipline, *U.S. Statistics on Corporal Punishment by State and Race: States Banning Corporal Punishment, at* http://www.stophitting.org/disatschool/statesBanning.php (last visited Sept. 26, 2004) [hereinafter Center for Effective Discipline, *States Banning*] (discussing state statistics on corporal punishment in the United States). Idaho, Colorado, New Mexico, Texas, Missouri, Arkansas, Louisiana, Mississippi, Alabama, South Carolina, Tennessee, Kentucky, and Indiana permit corporal punishment statewide. *Id.* Wyoming, Arizona, Kansas, Oklahoma, Georgia, Florida, North Carolina, Ohio, and Pennsylvania have corporal punishment on a district-by-district basis, but more than half of students live in districts without corporal punishment. *Id.* For the sake of clarity, it should be pointed out that states that still permit school corporal punishment do just that—they *permit* rather than *mandate* such punishment. No states require corporal punishment of misbehaving students. *See, e.g.*, Andre R. Imbrogno, *Corporal Punishment in America's Public Schools and the U.N. Convention on the Rights of the Child: A Case for Nonratification*, 29 J.L. & EDUC. 125, 129 (2000) (discussing that the "amount and severity of corporal punishment has decreased in the twentieth century" in American schools and that even the states which do permit corporal punishment in schools do not require the use of physical force in disciplining students); Kathryn R. Urbonya, *Determining Reasonableness Under the Fourth Amendment: Physical Force to Control and Punish Students*, 10 CORNELL J.L. & PUB. POL'Y 397, 427–32 (2001) (discussing that, as of 2001, nineteen states expressly forbade corporal punishment in schools and only two states directly allowed school officials to use physical discipline).

57. Elizabeth Thompson Gershoff, *Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review*, 128 PSYCHOL. BULL. 539, 543–44 (2002).

school corporal punishment as well.[58]

It does not require a degree in psychology to figure out that some of these outcomes will indispose children to learn optimally or even minimally. For example, an overly aggressive child or a child plagued by emotional instability is sure to be distracted by more pressing urges and needs than soaking up the school curricula. As a matter of fact, Professor Irwin Hyman, a psychologist who has extensively studied school corporal punishment, has concluded that corporal punishment does indeed interfere with students' ability to do schoolwork.[59]

I suppose putting children at risk of these insalubrious outcomes might be warranted if the scientific evidence also disclosed some extraordinary advantage unique to physical punishment, or if there was no other means of disciplining students. Nobody on either side of the spanking debate wants to deprive children of beneficial discipline or to turn schools into dens of iniquity or chaos. Dr. Gershoff's meta-analyses do reveal that corporal punishment is correlated with one arguably positive outcome: a smack will cause a child temporarily to cease his or her misconduct.[60] Since cessation is fleeting, however, this outcome is hardly the type of advantage that would justify endangering children in the ways identified by Dr. Gershoff.

Moreover, there are more effective alternative disciplinary techniques for controlling children and instilling them with moral values. Schools have at their disposal an array of traditional non-corporal penalties that may be imposed such as expulsion, suspension, detention and parental pick-ups.[61] Time-outs, deprivation of privileges, and explaining why misbehavior is unacceptable can readily be adapted to the school context.[62] There are also programs especially suitable to employing

58. Email from Dr. Elizabeth Gershoff, Dept. of Social Work, University of Michigan, to Susan H. Bitensky, Professor of Law, Michigan State University College of Law, 1 (Sept. 1, 2004).

59. *See* IRWIN A. HYMAN, READING, WRITING, AND THE HICKORY STICK: THE APPALLING STORY OF PHYSICAL AND PSYCHOLOGICAL ABUSE IN AMERICAN SCHOOLS 96, 99 (1990) (stating that approximately seventy percent of students with traumatic stress symptoms tend to have problems with academic performance); *see also* Murray A. Straus, *New Evidence for the Benefits of Never Spanking*, SOCIETY, Sept./Oct. 2001, at 52, 55–56 (asserting that there is evidence that corporal punishment of young children may undermine the foundations for cognitive development so that these children will continue to have difficulties with cognitive skills later in childhood).

60. Gershoff, *supra* note 57, at 543–44.

61. *See* Center for Effective Discipline, *School Corporal Punishment Alternatives*, *at* http://stophitting.com/disatschool/alternatives.php (last visited July 15, 2004) (discussing school corporal punishment alternatives and misbehavior prevention) [hereinafter Center for Effective Discipline, *Punishment Alternatives*].

62. *Cf.* MICHAEL J. MARSHALL, WHY SPANKING DOESN'T WORK: STOPPING THE BAD HABIT

school resources. These programs include providing character education curriculum, enlisting the assistance of school psychologists and counselors, giving student recognition awards for good behavior, and peer mediation.[63]

Dr. Gershoff's scientific findings, however, apply to all children. On what grounds, then, can I argue that *Ingraham* and its legacy has particularly and uniquely disadvantaged black schoolchildren? Those grounds lie in American history and in the racial bias with which school corporal punishment is presently administered. It is an undisputed historical fact that in the antebellum South it was *de rigueur* for slaveholders to whip or beat their slaves with impunity.[64] Apparently, slaveholders believed that physical coercion would produce docility without offending moral or legal precepts because the victims were slaves. One historian has instructed that the lash was the *primary* means of controlling slaves.[65] Another has revealed that the practice was so pervasive that many slaves actually conceptualized freedom as "abolition of punishment by the lash."[66] Moreover, although the Civil War put an end to slavery, it did not stop whites' corporal punishment of blacks. Freed slaves were still frequently hit,[67] especially if they had

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AND GETTING THE UPPER HAND ON EFFECTIVE DISCIPLINE 123 (2002) (recommending that parents should try time-out and revoking privileges to discipline their children); JANE NELSEN, ET AL., POSITIVE DISCIPLINE A–Z: 1001 SOLUTIONS TO EVERYDAY PARENTING PROBLEMS, 5, 23–26 (1993) (suggesting that parents should use family discussions and time-out in disciplining their children).

63. Center for Effective Discipline, *Punishment Alternatives*, *supra* note 61.

64. Everette Swinney, *Suppressing the Ku Klux Klan*: The Enforcement of the Reconstruction Amendments 1870-1874*, *in* AMERICAN LEGAL AND CONSTITUTIONAL HISTORY: A GARLAND SERIES OF OUTSTANDING DISSERTATIONS 36–37 (Harold Hyman, et al. eds., 1987). For additional historical accounts of the flogging of slaves, see JOHN W. BLASSINGAME, THE SLAVE COMMUNITY: PLANTATION LIFE IN THE ANTEBELLUM SOUTH 251 (1979); FREDERICK DOUGLASS, THE LIFE AND TIMES OF FREDERICK DOUGLASS 52, 121 (Rayford W. Logan ed., 1962) (1892); PAGE SMITH, THE NATION COMES OF AGE, 615–16 (1981); Aremona G. Bennett, *Phantom Freedom: Official Acceptance of Violence to Personal Security and Subversion of Proprietary Rights and Ambitions Following Emancipation, 1865–1910*, 70 CHI. KENT L. REV. 439, 440 (1994).

65. Swinney, *supra* note 64, at 36–37.

66. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877, at 78 (Henry Steele Commager & Richard B. Morris eds., 1988).

67. *See* DONALD G. NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865–1868 *passim* (Harold M. Hyman & William P. Hobby eds., 1979) (giving examples of freedmen beaten and shot like wild animals); GEORGE C. RABLE, BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION 72-73 (1984) (stating that freedmen were shot and whipped to influence votes); ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION *passim* (Kenneth B. Clark, ed., 1971) (discussing incidents of blacks being lashed, beaten, and murdered); Swinney, *supra* note 64, at 51–52, 208–09, 217–18, 279 (remarking that the Klan was responsible for hundreds of whippings in the late 1870s).

the temerity to achieve economic success or to exercise their political and legal rights.[68] As one observer described upon touring the newly defeated South, corporal punishment of blacks remained a "habit so inveterate with a great many persons as to render, on the least provocation, the impulse to whip a negro almost irresistible."[69]

During Reconstruction, the Ku Klux Klan and other like-minded ruffians terrorized the southern black population and its allies.[70] These vigilantes thought nothing of intimidating and assaulting entire black families.[71] The Klan persecuted freedmen and freedwomen with a repertoire of shootings, lynchings, and whippings, as well as with more outlandish crimes.[72] "Whipping, however, appears to have continued from the days of slavery as a favorite, if not almost reflexive, means" of keeping black Southerners under white thumbs.[73] The extent of this violence against blacks, even after emancipation, cannot be overstated. After the war, this became such a problem that Congress was moved to enact a series of statutes crafted to halt these and other continuing transgressions against blacks.[74]

Thus, for black schoolchildren in the twentieth and twenty-first centuries, corporal punishment has been and is loaded with connotations of racism, hate, and oppression. Corporal punishment reverberates with the collective historical experience of blacks writhing under the rod during slavery and its aftermath. Indeed, incidents of Klan beatings of

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68. *See* TRELEASE, *supra* note 67, *passim* (discussing incidents of blacks being lashed, beaten, and murdered).

69. 1 CARL SCHURZ, *Report on the Condition of the South*, *in* SPEECHES, CORRESPONDENCE AND POLITICAL PAPERS OF CARL SCHURZ 279, 316 (Frederic Bancroft ed., 1913).

70. FONER, *supra* note 66, at 425–36; Swinney, *supra* note 64, at 46-48; TRELEASE, *supra* note 67, at xxxiv.

71. CONG. GLOBE, 42d Cong., 1st Sess. 437–38 (1871) (statement of Rep. Cobb); FONER, *supra* note 66, at 119, 427, 429–30; NIEMAN, *supra* note 67, at 124; TRELEASE, *supra* note 67, *passim*.

72. FONER, *supra* note 66, at 426–31; DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE 24-28, 100 (1996); RABLE, *supra* note 67, at 28–30, 98; TRELEASE, *supra* note 67, *passim*; Swinney, *supra* note 64, at 48, 208–09, 216–17, 250.

73. Susan H. Bitensky, *Section 1983: Agent of Peace or Vehicle of Violence Against Children?*, 54 OKLA. L. REV. 333, 334 (2001) [hereinafter Bitensky, *Agent of Peace*].

74. *See, e.g.*, Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (1871) (stating that any injured party who was deprived of their rights now has redress under the laws); Reconstruction Act of 1867, ch. 153, 14 Stat. 428 (1867) (calling for an Act that called for military forces to suppress insurrections); Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (declaring blacks are citizens of the United States and have the rights and protections of freedmen); Freedman's Bureau Act of 1865, ch. 90, 13 Stat. 507 (1865) (establishing a War Department to control all subjects relating to freedmen).

blacks continued right into the twentieth century.[75] Not unlike the Klan's cross burnings in its black neighbors' yards,[76] corporal punishment of American black schoolchildren is fraught with odious meanings and implications not readily apparent to their white counterparts. And, these are meanings and implications of objectification of blacks as "property," or, if not "property," objectification of these children as holding some kind of sub-human status.[77]

To add insult to injury, statistics for the 1999-2000 academic year show that "[b]lack students are hit at a rate that is more than twice their makeup in the population. Blacks comprise 17% of students, but receive 39% of paddlings. Whites make up 62% of all students, but receive 53% of the corporal punishment."[78] Along similar lines, a Memphis City Schools study published in 2004 shows that in the Memphis school district, "[b]lack students and boys were overwhelmingly more likely to get spanked than their white and female counterparts. Roughly 97% of the 27,918 paddlings last year were given to the district's black children, while only 2% were given to white children."[79] The fact that corporal punishment both resurrects a semi-chattel status for blacks and in modern times is used at least twice as frequently on black pupils as on white students can only compound the toll that this form of punishment takes on black children's self-esteem and aspirations.

If ever a pedagogical practice was to carry the potential for making African-American schoolchildren feel inferior and for thwarting their opportunity for educational progress, corporal punishment would seem to be that practice. Allowing such punishment to persist in the schools is hardly the psychological enabling of individual educational potential that *Brown I* requires.[80] In giving public schools *carte blanche* approval

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75. *See* Virginia v. Black, 538 U.S. 343, 354–55 (2003) (plurality opinion) (O'Connor, J., opinion of the Court) (discussing acts of Klan violence occurring in the 1920s and during the civil rights movement of the 1950s and 1960s); *See id.* at 389–90 (Thomas, J., dissenting) (discussing the Klan's use of violence in the 1900s).

76. *See id.* at 352–57 & 360 n.2 (recognizing a burning cross as a symbol of hate and white supremacy).

77. *See* SUSAN H. BITENSKY, CORPORAL PUNISHMENT OF CHILDREN: A HUMAN RIGHTS VIOLATION (forthcoming 2005).

78. Center for Effective Discipline, *States Banning, supra* note 56. I was advised of the year for which the above-referenced statistics are valid by the Executive Director of the Center for Effective Discipline. Telephone Interview with Nadine Block, Executive Director, Center for Effective Discipline (Feb. 4, 2004).

79. Ruma Banerji Kumar, *Paddling May Not Really Be Last Resort, Data Show*, COM. APPEAL (Memphis, Tenn.), Feb. 27, 2004 at B1.

80. *See supra* notes 53–60 and accompanying text (discussing how corporal punishment

to use corporal punishment on children as far as the Eighth Amendment is concerned, *Ingraham v. Wright* represents the dashing of *Brown I's* rich potential and of its chief concerns.

Ingraham does not interfere, of course, with the political discretion of individual states to outlaw school corporal punishment. But, in the absence of Eighth Amendment restraints, approximately half of the states have seen fit to allow such punishment;[81] although, of these, some states have delegated power to local school districts to prohibit the punishment on a district-by-district basis.[82] The result is that in many areas of the United States, school corporal punishment continues—meaning that many black schoolchildren cannot fully benefit from *Brown I's* psychological enabling component. Moreover, the *Ingraham* holding telegraphs quite a punch to the black community, including its children. The *Ingraham* holding plays a deleterious pedagogical role in conveying that the U.S. Constitution is no barrier to the existence of the remnants of slavery and can offer no succor to the youngest victims of slavery's legacy.[83]

Incidentally, in identifying the infirmities that corporal punishment may inflict on any child, white or black, some social science researchers

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hinders a child's well-being and undermines the decision of *Brown I*).

81. *See supra* note 55–56 and accompanying text (remarking that some states still allow corporal punishment in schools).

82. *See* Irwin A. Hyman et al., *Paddling and Pro-Paddling Polemics: Refuting Nineteenth Century Pedagogy*, 31 J. L. & EDUC. 74, 77–78 (2002); Urbonya, *supra* note 56, at 427–32.

83. As I have written elsewhere:

> Generally speaking, there is a pedagogical purpose inherent in virtually all law. Laws are made to be known; otherwise, they would be ineffective as an instrument of governance or restraint. The educational impact of law is perhaps most effectually realized by the reciprocal interplay between law and social values. Law draws its content from the values of the people it governs. Law assimilates not only a society's values and priorities as they are, but also those values and priorities which comprise that society's goals and needs. It is in this latter initiatory phase that law has its most dramatic educative effect because it crystallizes and makes visible the norms which constitute a society's aspirations and ideals.

Susan H. Bitensky, *Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children*, 31 U. MICH. J.L. REFORM 353, 441 (1998) [hereinafter Bitensky, *Spare the Rod*]. For examples of other works on the pedagogical role of law see Aristotle, *Nicomachean Ethics*, *in* THE BASIC WORKS OF ARISTOTLE 927, 952 (W.D. Ross trans. & Richard McKeon ed., 1941); Plato, *Book VII*, *in* THE LAWS OF PLATO 215–16 (Thomas L. Pangle trans. & ed., 1980); David R. Barnhizer, *Prophets, Priests and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127, 162–63 (1988); Paul Brest, *The Thirty-First Cleveland-Marshall Fund Lecture: Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175, 177–79 (1986); Keith Burgess-Jackson, *Bad Samaritanism and the Pedagogical Function of Law*, 8 CRIM. JUST. J. 1, 3–4, 26 (1985); Anne Norton, *Transubstantiation: The Dialectic of Constitutional Authority*, 55 U. CHI. L. REV. 458, 468–69 (1988); Philip Soper, *The Moral Value of Law*, 84 MICH. L. REV. 63, 85 (1985).

and theorists have proposed what I have labeled the "African-American exception."[84] They have advanced the notion that paddling does no harm to and, in fact, is beneficial for black children in the United States even if such punishment harms white children.[85] Proponents of the exception frequently offer as an explanation for it that strong physical chastisement is necessary to keep black children out of trouble in crime-ridden environments.[86]

I emphatically decline to adopt this relativistic approach, depending on skin color, to corporal punishment of children. The "African-American exception" is hardly an irrefutable fact. There are other, equally respected social science researchers and theorists who have posited that corporal punishment may be detrimental to black children as well.[87] Indeed, Dr. Gershoff's recent meta-analyses have found an association between corporal punishment of children and serious negative behavioral outcomes regardless of the race of the children involved,[88] thereby making short work of the exceptionalists. But, even assuming *arguendo* that there is a split of authority on the subject, I would prefer to err, if error it is, on the side of repudiating a punishment that has well-known antecedents in the whipping of American slaves. Recommending its retention particularly for black children seems a most grievous thing, constituting further unequal treatment of black

84. BITENSKY, *Agent of Peace, supra* note 73.

85. *See, e.g.*, Marjorie Linder Gunnoe & Carrie Lea Mariner, *Toward A Developmental-Contextual Model of the Effects of Parental Spanking on Children's Aggression*, 151 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 768, 774 (1997) (reporting that corporal punishment of African-American children deters subsequent fighting by them); Robert E. Larzelere, *Child Outcomes of Nonabusive and Customary Physical Punishment by Parents: An Updated Literature Review*, 3 CLINICAL CHILD & FAM. PSYCHOL. REV. 199, 210, 213 (2000) (summarizing that studies show spanking to have neutral or beneficial effects on African-American children); Arthur L. Whaley, *Sociocultrual Differences in the Developmental Consequences of the Use of Physical Discipline During Childhood for Arican-Americans*, 6 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 5, 7–10 (2000) (stating that the results of studies concerning the effects of corporal punishment on African-American children are inconsistent, but that none of the studies demonstrate such punishment to cause disruptive disorders in these children).

86. *See* MURRAY A. STRAUS & DENISE A. DONNELLY, BEATING THE DEVIL OUT OF THEM CORPORAL PUNISHMENT IN AMERICAN FAMILIES AND ITS EFFECTS ON CHILDREN 117 (2001) (summarizing one of the rationales of those pundits who wish to retain corporal punishment for black children).

87. *See, e.g.*, JAMES P. COMER & ALVIN F. POUSSAINT, RAISING BLACK CHILDREN: TWO LEADING PSYCHIATRISTS CONFRONT THE EDUCATIONAL, SOCIAL AND EMOTIONAL PROBLEMS FACING BLACK CHILDREN 49–51 (1992) (stating that those children punished by hitting have a greater tendency for violence); Kristin M. McCabe et al., *Family Protective Factors Among Urban African-American Youth*, 28 J. CLINICAL CHILD PSYCHOL. 137, 139, 147 (1999).

88. *See* Gershoff, *supra* note 57, at 543–44 (indicating parental corporal punishment is associated with undesirable behaviors and experiences).

children, both in comparison to adults and to children of other races. Human beings have it in common to flinch from pain; they share psychological reactions to being rendered simultaneously helpless and maddened by the use of force against which there is no recourse.[89] There is a universal hunger for bodily integrity and right treatment, as well as for a respect that recognizes each person's humanity.[90] To adopt this form of African-American exceptionalism is to deny black children fulfillment of this fundamental aspect of their human nature and to put them on the same footing as their enslaved ancestors.[91] This is, of course, totally unacceptable both morally and humanistically speaking.

IV. UNDOING *INGRAHAM'S* BETRAYAL OF *BROWN I*

Before proposing legal reform to revive *Brown I's* full vitality for black children, it may be helpful for me to summarize my thesis up to this point. Corporal punishment of black schoolchildren is laden with historical and cultural messages that they are inferior to other children, and these messages are reinforced by the fact that black students are twice as likely to suffer such punishment as white students. The lack of confidence thereby inspired in African-American students is apt to interfere with the learning process. It was precisely the Supreme Court's dismay over black children's harboring such inferiority feelings, with the resultant impediment to education, that undergirded and formed part of the holding in *Brown I*. When the *Ingraham* Court ruled that the Eighth Amendment does not apply to public school corporal punishment, the Court effectively sanctioned the continuation of this practice as a constitutional matter and betrayed *Brown I's* potential to equalize, truly and substantively, schooling for blacks and whites in this country.

Can anything be done to remedy the damage *Ingraham* has wrought? There is probably no way to repair the inferiority feelings and educational loss suffered by black schoolchildren in the past. Those children cannot have a "rerun" of their childhoods and of the developmental milestones through which they passed under the burden of corporal punishment. However, there are feasible and long overdue

89. Bitensky, *Spare the Rod, supra* note 83, at 423.

90. *See* THOMAS HOBBES, LEVIATHAN PARTS I AND II 106, 149 (Herbert W. Schneider ed., 1958) (commenting on the respect that people naturally seek from each other); IMMANUEL KANT, THE PHILOSOPHY OF LAW 54, 56 (W. Hastie trans., Augustus M. Kelley Publishers 1974) (1796–97) (recommending that people should regard themselves as an end rather than simply a means and that every person ought to be his or her own master as a matter of right).

91. *See generally* Bitensky, *Agent of Peace, supra* note 73.

measures that can be taken to spare future generations of black schoolchildren from the same fate.

The time has come to overturn *Ingraham v. Wright*. Yes, I know, *stare decisis* and all that. Yet, the U.S. Supreme Court has not shied away from reversing course when it has perceived its direction to be outdated and/or misguided.[92] *Ingraham*, a 5-4 decision to begin with,[93] is ripe for overruling for several reasons in relation to its Eighth Amendment holding.[94] First, the decision was not convincingly reasoned when it was made in 1977.[95] Justice White's *Ingraham* dissent highlights that a textualist construction of the Eighth Amendment conflicts outright with the majority's originalist interpretation limiting the amendment's application to criminal proceedings—the latter interpretation created out of a patchwork of inferences rather than from any directly relevant historical evidence.[96] Justice White explains that the Framers' failure to cabin the language of the Amendment with the word "criminal" demonstrates that the provision was drafted to forbid "all inhumane or barbaric punishments,

92. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 556–58, 561, 567 (1995) (effectively narrowing congressional Commerce Clause power to regulating only economic activities after decades of upholding a broader interpretation of the Clause); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985) (overruling National League of Cities v. Usery, 426 U.S. 833 (1976), in relation to federalism as a restraint on Congress's Commerce Clause power to regulate state activities); Brown v. Bd. of Educ., 347 U.S. 483, 494-95 (1954) (effectively repudiating the separate-but-equal doctrine announced in Plessy v. Ferguson, 163 U.S. 537 (1896)).

93. Ingraham v. Wright, 430 U.S. 651 (1977).

94. There seems to be an inexplicable dearth of commentary critiquing the holding of *Ingraham* in relation to the Eighth Amendment. *But see* Lynn Roy, *Chalk Talk: Corporal Punishment in American Public Schools and the Rights of the Child*, 30 J.L. & EDUC. 554, 558–59, 563 (2001) (taking the *Ingraham* majority to task for deviating from the Court's own previously used standards in interpreting the Eighth Amendment, for failing to give the amendment a "'flexible and dynamic'" construction and calling for lower federal courts to subvert the effects of *Ingraham*); Margaret Meriwether Cordray, *Contempt Sanctions and the Excessive Fines Clause*, 76 N.C. L. REV. 407, 447 (1998) (observing that "*Ingraham's* entire discussion of the scope of the Eighth Amendment is now of dubious value" since the Court subsequently ruled in another case that the Eighth Amendment's Excessive Fines Clause governs civil forfeiture proceedings); RONALD T. HYMAN & CHARLES H. RATHBONE, CORPORAL PUNISHMENT IN SCHOOLS: READING THE LAW 3–4 (1993) (paraphrasing another scholar's indictment of the *Ingraham* Court's Eighth Amendment analysis in Irene Merker Rosenberg, Ingraham v. Wright: *The Supreme Court's Whipping Boy*, 78 COLUM. L. REV. 75, 76–89 (1978)); *infra* notes 95–107 and accompanying text (discussing the flaws of the majority's reasoning in *Ingraham*).

95. HYMAN & RATHBONE, *supra* note 94, at 3; Roy, *supra* note 94, at 554, 558–59.

96. *Ingraham*, 430 U.S. at 664–66; *see also* Victoria J. Dodd, *The Education Justice: The Honorable Lewis Franklin Powell, Jr.*, 29 FORDHAM URB. L.J. 683, 691 (2001) (detailing that Justice Powell's opinion for the Court in *Ingraham* relied upon the Virginia Declaration of Rights of 1776 and the English Bill of Rights of 1689 in ascribing meaning to the Eighth Amendment).

no matter what the nature of the offense for which the punishment is imposed."[97] At a minimum, Justice White's sensible textualism raises questions about the plausibility of an originalist analysis predicated entirely on inferences drawn by the Court.

Moreover, as Justice White observes, the Supreme Court itself has not limited the application of the Eighth Amendment only to criminal punishments.[98] For example, in *Estelle v. Gamble*,[99] the Court held that intentional disregard by correctional authorities of prisoners' medical needs violated the Eighth Amendment's guarantee against cruel and unusual punishments.[100] Obviously, ignoring a prisoner's medical needs is not a judicially-imposed punishment for perpetration of a crime.[101]

Finally, the *Ingraham* majority opinion's attempt to immunize school corporal punishment from Eighth Amendment strictures on the theory that schoolchildren are in certain key ways distinguishable from prisoners seems embarrassingly flimsy.[102] I am not suggesting that the Court erred because schoolchildern are subject to exactly the same circumstances as prisoners; clearly, there are many circumstances that are different for each group. The problem is that the particular living conditions selected by the Court are ones actually shared by schoolchildren and prisoners, at least to an appreciable degree. School attendance is not, as the majority opinion suggests, *sometimes* involuntary.[103] All states make a number of years of schooling compulsory.[104] Children, and not just the "very young" ones singled

97. *Ingraham*, 430 U.S. at 685 (White, J., dissenting).

98. *Id.* at 688 n.4 (White, J., dissenting).

99. Estelle v. Gamble, 429 U.S. 97 (1976).

100. *Id.* at 104–05, 108.

101. *See Ingraham*, 430 U.S. at 688 n.4 (White, J., dissenting) (stating that the Eighth Amendment's application extends beyond criminal punishments).

102. *Id.* at 668–70.

103. *Id.* at 670.

104. The *Ingraham* majority acknowledged that compulsory education was mandated in New England even before the American Revolution and that by 1918 compulsory school attendance laws were in effect in all states. *Id.* at 661 n.14. Such laws are still in existence. *See* National Center for Education Statistics, *Digest of Education Statistics, 2002: Ch.2. Elementary and Secondary Education: Table 150, at* http://nces.ed.gov/programs/digest/d02/tables/dt150.asp (last visited Sept. 26, 2004) (containing table 150, prepared in May, 2001, covering statistics on compulsory education in each state as of 2000, except for Colorado and the District of Columbia); Marsha L. Levick & Francine T. Sherman, *When Individual Differences Demand Equal Treatment: An Equal Rights Approach to the Special Needs of Girls in the Juvenile Justice System*, 18 WIS. WOMEN'S L.J. 9, 42 & n.189 (2003) (emphasizing that all fifty states have compulsory education laws requiring fifteen-year olds to attend school); Judith G. McMullen, *Behind Closed Doors: Should States Regulate Homeschooling?*, 54 S.C. L. REV. 75, 98 (2002) (analyzing states' compulsory education laws in light of homeschooling).

out by the Court,[105] are therefore restrained from leaving school during school hours. To say, as the majority did, that a child "brings with him [to school] the support of family and friends"[106] is chimerical, a notion unsupported by any data; and more appropriate to a romantic, Norman Rockwellian vision of the lives of American schoolchildren. Indeed, during my stint as Associate Counsel to the New York City Board of Education, it was quite evident that many children saw their schools as refuges from dysfunctional, abusive and/or neglectful families and the often anarchic neighborhoods in which they resided. The majority's further offering that children in school have the protection of their teachers,[107] strikes me as a ridiculous distinction since it is usually the teachers who do the punishing.

Ill-conceived when it was decided in 1977, *Ingraham* has become increasingly absurd. For example, consider it in comparison to the Supreme Court's 1992 decision in *Hudson v. McMillian*.[108] In that case, a prison inmate was beaten by security guards while he was handcuffed and shackled.[109] The guards punched him in the mouth, eyes, chest, and stomach, and kicked him from behind.[110] As a result, the victim suffered minor bruises and swelling, some loosened teeth, and a crack in his partial dental plate.[111] The United States Court of Appeals for the Fifth Circuit acknowledged the use of force to be excessive but refused to rule for the prisoner because his injuries were minor, requiring no medical attention.[112] The Supreme Court reversed, holding that the use of excessive force against a prisoner may constitute an Eighth Amendment violation even though the prisoner's injuries, which must be more than *de minimis*, are minor.[113] In contrast, in *Ingraham* a schoolchild who suffered injuries requiring medical intervention after being paddled over twenty times was denied recourse to an Eighth Amendment claim.[114] Putting *Ingraham* together with *Hudson* creates the bizarre situation in which convicted criminals are afforded more protection against violence in prison than children are provided in school. Something is very wrong with this picture, and the defect is in

105. *Ingraham*, 430 U.S. at 670.
106. *Id.*
107. *Id.*
108. Hudson v. McMillian, 503 U.S. 1 (1992).
109. *Id.* at 4.
110. *Id.*
111. *Id.*
112. *Id.* at 5.
113. *Id.* at 9–10.
114. Ingraham v. Wright, 430 U.S. 651, 657 (1977).

Ingraham, not *Hudson*.

Ill-conceived when *Ingraham* was decided in 1977 and made absurd by juxtaposition of the *Hudson* case in 1992, it is now fair to say that *Ingraham* has become a complete anachronism in 2004. No, that is too kind. *Ingraham* is rotting on the vine and continuing to damage lives in the process. There is no reason why, under the Supreme Court's own Eighth Amendment jurisprudence, *Ingraham* should not be long gone. It is well accepted that the cryptic phraseology of "cruel and unusual punishments" in the Eighth Amendment can best be meaningfully interpreted and applied by resorting to sources beyond the Constitution itself. The Supreme Court has determined that the Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"[115] and that it's meaning may be updated "as public opinion becomes enlightened by a humane justice."[116]

Standards of decency and humanity do evolve. They are affected by increasing knowledge and by a populace's gravitation, sometimes sudden and sometimes incremental, toward altered practices. There are signs that a palpable evolution has taken place within the United States in relation to corporal punishment of children—signs that were not present when *Ingraham* was decided in 1977. Our knowledge base has undergone a radical expansion with respect to understanding corporal punishment's possible detrimental outcomes for children, as disclosed by Gershoff's meta-analyses.[117] Commentators have begun sharpening our awareness of corporal punishment's link to slavery and racism.[118] There is a growing consensus among child-care and other professionals in the United States that school corporal punishment should be forbidden.[119] And, unlike the situation in 1977 when only two states

115. Trop v. Dulles, 356 U.S. 86, 101 (1958); *accord* Atkins v. Virginia, 536 U.S. 304, 311–12 (2002); *see also* Hope v. Pelzer, 536 U.S. 730, 742 (2002) (referring to the Eighth Amendment's import in terms of contemporary values of decency, dignity and civilization).

116. Weems v. United States, 217 U.S. 349, 378 (1910).

117. Gershoff, *supra* note 57, at 544–48.

118. *See, e.g.*, STRAUS & DONNELLY, *supra* note 86, at 117 (asserting that "corporal punishment has become a part of black culture in response to slavery and oppression"); Bitensky, *Agent of Peace*, *supra* note 73, at 333-35 (noting abolitionists criticized both slavery and fought to end corporal punishment of children); Bitensky, *Spare the Rod, supra* note 83, at 422–23 (hypothesizing that corporal punishment has its roots in slavery).

119. Among the forty national organizations opposed to school corporal punishment are the American Academy of Pediatrics, the American Bar Association, the American Medical Association, the American Psychiatric Association, the American Psychological Association, the National Association of Elementary School Principals, the National Association for the Advancement of Colored People, the National Association of Social Workers, the National Education Association, the National Mental Health Association, the National Association of School Nurses, the National Association of School Psychologists, and the National Association of

banned this punishment,[120] now more than half of the states prohibit it.[121] In short, the standards of decency and humanity have been shifting rather dramatically against physical chastisement of children in American schools.

At times and on an unpredictable basis, the Supreme Court has also consulted international and foreign law in order to define the evolving standards of decency in a given period.[122] If the Court was to use this interpretive technique in a relitigation of school corporal punishment under the Eighth Amendment, I suspect that the Justices would be shocked at what they would find. At least five human rights treaties have been authoritatively construed to implicitly prohibit not just school corporal punishment of children but *all* corporal punishment of children.[123] Those treaties are the United Nations Convention on the

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State Boards of Education. Center for Effective Discipline, *Discipline at School (NCACPS): U.S. Organizations Opposed to School Corporal Punishment, at* http://www.stophitting.org/disatschool/usorgs.php (last visited Sept. 26, 2004).

120. Ingraham v. Wright, 430 U.S. 651, 663 (1977) (referring to Massachusetts and New Jersey as the only two states that had outlawed all corporal punishment in the public elementary and secondary schools as of 1977).

121. *See* Center for Effective Discipline, *States Banning, supra* note 56 (observing that currently twenty-six states have banned corporal punishment and nine other states have more than half of all students in districts with no corporal punishment).

122. DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 740–42 (3d ed. 2001).

123. *See Concluding Observations of the Committee on Economic, Social, and Cultural Rights: United Kingdom of Great Britain and Northern Ireland*, 28th Sess., ¶ 36, U.N. Doc. E/C.12/1/Add.79 (2002) (recommending that, under Article 10 of the International Covenant on Economic, Social, and Cultural Rights, corporal punishment of children in families should be forbidden); *Concluding Observations of the Committee on the Rights of the Child: Paraguay*, 28th Sess., ¶¶ 31-32, U.N. Doc. CRC/C/15/Add.166 (2001) (interpreting Article 19 of the U.N. Convention on the Rights of the Child as prohibiting corporal punishment of children); *General Observations of the European Committee of Social Rights Regarding Articles 7, Para. 10, and 17*, Conclusions XV-2, Vol. 1, at 26–29 (2001) (observing that Article 17 of the European Social Charter and the European Social Charter (revised) bar corporal punishment of children); *Conclusions of the European Committee of Social Rights Concerning Articles 2–4, 7–11, 14–15, and 17–18 of the Charter in Respect of Poland*, Conclusions XV-2, Vol.2, at 407, 468 (2001) (inquiring whether Poland has enacted legislation banning all corporal punishment by children so as to comply with Article 17 of the European Social Charter); *Concluding Observations of the Human Rights Committee: Guyana*, 68th Sess., ¶ 12, U.N. Doc. CCPR/C/79/Add.121 (2000) (urging that, under Article 7 of the International Coveneant on Civil and Political Rights, Guyana "should take legal and other measurs to eliminate this practice [of corporal punishment of children]"); *Concluding Observations of the Human Rights Committee: United Kingdom and Northern Irealnd—the Crown Dependencies of Jersey, Guernsey, and the Isle of Man*, 68th Sess. § 11, U.N. Doc. CCPR/C/79/Add.119 (2000) (recommending, under Articles 7 and 10 of the International Covenant on Civil and Political Rights, "the adoption of legislation to outlaw corporal punishment" of children on the Isle of Man); *General Comment No. 13 of the Committee on Economic, Social, and Cultural Rights*, 21st Sess., ¶ 41, U.N. Doc. E/C.12/1999/10 (1999) (construing Article 13, paragraph 1 of the International Covenant on Economic, Social, and Cultural Rights to prohibit school corporal punishment); *Concluding Observations of the*

Rights of the Child,[124] the International Covenant on Civil and Political Rights,[125] the International Covenant on Economic, Social and Cultural Rights,[126] the European Social Charters,[127] and the American Convention on Human Rights.[128] That corporal punishment is a human rights law violation marks the evolving standards of decency in the international community with respect to right treatment of children and reflects an advance in our comprehension as to what is "humane justice" toward children. As such, this body of human rights law should infuse the United States Supreme Court's interpretation of whether and how the Eighth Amendment's proscription against cruel and unusual punishment applies to corporal punishment in public schools.

Similarly, if the Court in this hypothetical relitigation was to refer to the laws of foreign jurisdictions, it would learn that, as of this writing, fourteen countries have banned *all* corporal punishment of children within their respective borders. Those countries are Sweden, Finland, Norway, Denmark, Austria, Cyprus, Germany, Iceland, Croatia, Latvia, Bulgaria, Israel, Ukraine, and Romania.[129] In addition, all industrialized countries except, the United States and one state in Australia, have banned school corporal punishment of children.[130] These facts too are

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Committee on the Rights of the Child: Japan, 18th Sess., ¶ 45, U.N. Doc. CRC/C/15/Add. 90 (1998) (reading Article 19 of the U.N. Convention on the Rights of the Child as prohibiting corporal punishment of children); *Annual Report: Areas in Which Steps Need to Be Taken Towards Full Observance of the Human Rights Set Forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights*, 1994 INTER-AM. Y.B. ON H.R. (INTER-AM. COMM'N ON H.R.) 690, 704 (stating that full compliance with the American Convention on Human Rights necessitates that states' parties should ratify the U.N. Convention on the Rights of the Child so as to ensure that children "are not the targets of violence."). *See also* Bitensky, *Agent of Peace, supra* note 73; Bitensky, *Spare the Rod, supra* note 83, at 388–421 (observing that international human rights treaties "employ language that, either explicitly or implicitly obligates both the public and private sector to observe human rights").

124. *U.N. Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49 (A/44/49), at 166, U.N. Doc. A/RES/44/25 (1989), *available at* http://www./unhchr.ch/html/menu3/b/k2crc.htm.

125. *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI), Annex, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, 52, U.N. Doc. A/6316 (1967).

126. *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI), Annex 1, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967).

127. European Social Charter (Revised), May 3, 1996, 36 I.L.M. 31, European Social Charter, Oct. 18, 1961, 519 U.N.T.S. 89.

128. American Convention on Human Rights, OEA/Ser. L.V/II.82, doc. 6 rev. 1, at 25 (1992).

129. *See* Bitensky, *Agent of the Peace, supra* note 73; *see also* Bitensky, *Spare the Rod, supra* note 83, at 361-86 (recounting that as of 1998, Sweden, Finland, Norway, Denmark, Austria, and Cyprus had enacted bans on all corporal punishment of children and Italy's highest court had issued a decision to that effect).

130. *See* Center for Effective Discipline, *Discipline at School (NCACPS): Facts About Corporal Punishment Worldwide, at* http://www.stophitting.org/disatschool/worldwide.php (last

persuasive evidence of evolving modern standards of decency—evidence available to inform any reconsideration of whether the Eighth Amendment should apply to corporal punishment in the public schools and, if so, whether the amendment's application should dictate the abolition of the practice.

V. CONCLUSION

Ideally, what I would like to see happen is a relitigation of the Eighth Amendment issue using the interpretive technique and current information described above. Again, in the best of all possible worlds, I would like to see the Supreme Court hold that *Ingraham* is no more and that the Eighth Amendment's ban on cruel and unusual punishments not only applies to public school corporal punishment, but actually forbids it. Without reading the ban into the Eighth Amendment, states will remain free to permit public school corporal punishment. Granted, in the absence of a constitutional ban, additional states could exercise the political will to enact their own prohibitions on public school corporal punishment, but this piecemeal approach could take forever, and some states might never embrace such a legal reform. In the meantime, in the intransigent states, *Brown I's* quality education and psychological enabling components would continue to be undercut, and African-American schoolchildren would continue to suffer the educationally disabling consequences. Neither of these results seems tolerable as a constitutional or a moral matter.

Of course, repudiating *Ingraham* and recognizing a prohibition on corporal punishment of public schoolchildren in the Eighth Amendment will not by itself be a nostrum for all that ails *Brown I* or the education of African-Americans. Taking these steps is just that—some steps in the right direction. The problems posed in implementing *Brown I* and doing justice to black students in comparison to white students are complex and call for a multiplicity of ameliorative responses. The steps that I have proposed, however, at least remove one obstacle to and provide one prerequisite for the consummation of *Brown I* and the fuller blossoming of black schoolchildren's intellectual lives.

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visited Sept. 12, 2004). Until January 30, 2004, Canada was also one of the only industrialized countries to allow school corporal punishment. *Id.* However, on that date, the Supreme Court of Canada decided a case in which it held, among other things, that school corporal punishment would no longer be legal in that nation. Canadian Found. for Children, Youth and the Law v. Canada, (Att'y Gen.), [2004] S.C.R. 76, *available at* http://www.canlii.org/ca/cas/scc/2004/2004scc4.html (last visited Sept. 12, 2004).